



U.S. Department of Justice

Office of Legislative Affairs

Office of the Assistant Attorney General

Washington, D.C. 20530

February 7, 2019

The Honorable Jerrold Nadler
Chairman
Committee on the Judiciary
U.S. House of Representatives
Washington, DC 20515

Dear Chairman Nadler:

We write in response to the approval by the House Committee on the Judiciary (the Committee) of a subpoena concerning the testimony of Acting Attorney General Matthew Whitaker. We also respond to your January 22, 2019 letter. As you know, we had previously agreed that the Acting Attorney General would appear voluntarily before the committee tomorrow, February 8, 2019. The Acting Attorney General appreciated your invitation, and he has been diligently preparing for the opportunity to discuss the important work of the 115,000 men and women at the Department of Justice (Department).

Despite the Acting Attorney General's agreement, the Committee now has taken the premature step of seeking to subpoena the head of an executive department, and one who was perfectly willing to appear and testify on the agreed-upon date. In so doing, the Committee seeks to refocus this oversight hearing away from the Department and its programs and towards the President's confidential communications with the Acting Attorney General, a category of communications that Administrations of both parties have viewed as raising confidentiality interests that are vital to a President's ability to discharge the responsibilities of his office.

Several weeks ago, on January 9, 2019, you wrote to the Department to request that the Acting Attorney General testify before the Committee on a number of subjects concerning the Department's programs and operations. Those topics included potential legislation, the Department's litigating position in the Affordable Care Act case, the work of the Civil Rights Division, national security threats on the southern border, the President's public statements concerning the Special Counsel's investigation, and the Acting Attorney General's decision not to recuse from supervising the Special Counsel investigation. In response, the Acting Attorney General voluntarily agreed to appear, and he remains prepared to address the Committee's

questions on those and other subjects, consistent with the established practices of the Department, including the confidentiality obligations of the Executive Branch.

After the Acting Attorney General agreed to appear, you sent a second letter, on January 22, in which you advised that the Committee intended to ask him about his confidential communications, if any, with the President on seven different subjects. Most of those topics were distinct from the subjects identified in your January 9 letter, and to the extent there is overlap, your earlier letter did not suggest that the Committee was focused upon the Acting Attorney General's confidential communications with the President.

Even though the Acting Attorney General had agreed to testify, and even though the Committee had not yet asked him a single question, the Committee today authorized a subpoena to compel his testimony. We cannot understand this measure other than as an attempt to circumvent the constitutionally required accommodation process and thereby to transform the hearing into a public spectacle. Rather than conducting appropriate oversight into the Department's programs and activities, the Committee evidently seeks to ask questions about confidential presidential communications that no Attorney General could ever be expected to disclose under the circumstances.

The President has a constitutionally grounded interest in being able to engage in confidential communications with his senior advisers. As the Supreme Court has explained, the presidential communications component of executive privilege "is fundamental to the operation of Government and inextricably rooted in the separation of powers under the Constitution." *United States v. Nixon*, 418 U.S. 683, 708 (1974). The U.S. Court of Appeals for the District of Columbia Circuit has held that the privilege applies to congressional demands for presidential communications. See, e.g., *Senate Select Comm. on Presidential Campaign Activities v. Nixon*, 498 F.2d 725, 732 (D.C. Cir. 1974) (en banc). It is clear that your proposed questions seek the kind of information that the Executive Branch has, during Administrations of both parties, historically declined to provide to the Congress.

It has been the long-standing policy and practice of the Executive Branch that officials testifying at congressional hearings decline to disclose the content of their confidential communications with the President. As the *New York Times* recognized after Attorney General Sessions declined to discuss his conversations with the President in testimony in June 2017, "[p]revious executive branch officials of both parties have withheld information requested by Congress in the same manner." Charlie Savage, "On Executive Privilege and Sessions' Refusal to Answer Questions," *N.Y. Times*, June 16, 2017, at A18 (available online at <https://www.nytimes.com/2017/06/15/us/politics/executive-privilege-sessions-trump.html>).

Your January 22 letter asked the Department to notify the Committee in advance of the hearing "[i]f the President plans to invoke executive privilege to prevent [the Acting Attorney General] from answering any of the[] questions" identified in your letter. You further suggested that the Committee "will not accept your declining to answer any question on the theory that the

President may want to invoke his privilege in the future,” but rather that the President should “consider any matter involving assertion of privilege prior to your testimony.”

Respectfully, this proposed approach reflects a striking departure from the constitutionally based understanding between our co-equal branches of government. That understanding is supported by decades of judicial and historical precedents, which recognize that disagreements between the branches over access to privileged information should generally be resolved through good-faith negotiations. The invocation of executive privilege comes at the end, rather than the beginning, of such negotiations, and we are not aware of any precedent in which the President has invoked executive privilege even before the Committee has asked questions on the subject at a properly noticed hearing.

As President Reagan explained in his 1982 directive about “Procedures Governing Responses to Congressional Requests for Information,” “[h]istorically, good faith negotiations between Congress and the Executive Branch have minimized the need for invoking executive privilege” and “this tradition of accommodation” should be “the primary means of resolving conflicts between the Branches.” The D.C. Circuit reached the same conclusion in *United States v. AT&T*, 567 F.2d 121 (D.C. Cir. 1977), where it emphasized that the Founders “expect[ed] that where conflicts in scope of authority arose between the coordinate branches, a spirit of dynamic compromise would promote resolution of the dispute in the manner most likely to result in efficient and effective functioning of our governmental system,” *id.* at 127, and that each branch has “an implicit constitutional mandate to seek optimal accommodation through a realistic evaluation of the needs of the conflicting branches in the particular fact situation.” *Id.* at 130.

More recently, the Supreme Court reiterated that executive privilege is to be invoked only as a last resort. As the Court recognized, “[e]xecutive privilege is an extraordinary assertion of power not to be lightly invoked. Once executive privilege is asserted, coequal branches of the Government are set on a collision course. . . . These occasions for constitutional confrontation between the two branches should be avoided whenever possible.” *Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367, 389 (2004) (citations, internal quotation marks, and brackets omitted).

Former Attorney General William Barr expressed the same view in a 1989 opinion that he wrote during his tenure as Assistant Attorney General for the Office of Legal Counsel:

In practice, disputes with Congress in this area typically commence with an informal oral or written request from a congressional committee or subcommittee for information in the possession of the executive branch. Most such requests are honored promptly; in some cases, however, the executive branch official may resist supplying some or all of the requested information either because of the burden of compliance or because the information is of a sensitive nature. The executive branch agency and the committee staff will typically negotiate during this period to see if the dispute can be settled in a manner acceptable to both sides. In most cases

this accommodation process is sufficient to resolve any dispute. On occasion, however, the process breaks down, and a subpoena is issued. At that point, if further negotiation is unavailing, it is necessary to consider asking the President to assert executive privilege.

Congressional Requests for Confidential Executive Branch Information, 13 Op. O.L.C. 153, 161–62 (1989). As that summary makes clear, requests to the President about whether to assert executive privilege have traditionally come only *after* the issuance of subpoena, which itself has come only *after* a period of negotiation. Following that traditional process ensures that the President has information that is necessary for any decision about whether to invoke privilege, including whether the Committee has established that the information it requests is “demonstrably critical to the responsible fulfillment of the Committee’s functions” and whether the Committee’s stated legislative interest has been, or could be, accommodated with information from non-privileged sources. *Senate Select Comm.*, 498 F.2d at 731, 732–33.

In light of the foregoing, the Department strongly objects to the suggestion in your January 22 letter that the Acting Attorney General should request, in advance of his testimony, that the President assert executive privilege over communications involving the subject areas you have identified. Consistent with long-established practice, we would expect the Committee to pose the questions that it believes appropriate in connection with its oversight responsibilities, and the Acting Attorney General would do his best to answer those questions, consistent with the need to protect communications that are potentially subject to executive privilege. Such a hearing would be consistent with long-standing practice, and it would provide our respective branches of government with the best opportunity to explain any differences that arise and to seek to work them out in good-faith negotiations.

Should you go forward with the hearing on this basis, the Acting Attorney General remains prepared to explain how the Department has discharged its responsibilities during his time as the head of the Department. The Acting Attorney General will testify that at no time did the White House ask for, or did the Acting Attorney General provide, any promises or commitments concerning the Special Counsel’s investigation. He will explain that, since he became Acting Attorney General, the Department has continued to make its law enforcement decisions based upon the facts and law of each individual case, in accordance with established Department practices, and independent of any outside interference. With respect to the Special Counsel investigation, the Department has complied with the Special Counsel regulations, and the Acting Attorney General will make clear that there has been no change in how the Department has worked with the Special Counsel’s office. The Acting Attorney General is also prepared to discuss the process and the conclusions of the ethics review by which he concluded that there was no need for him to recuse himself from supervising the Special Counsel investigation.

We do not believe, however, that the Committee may legitimately expect the Acting Attorney General to discuss his communications with the President. If there are questions at the hearing that the Acting Attorney General does not answer to the satisfaction of the Committee,

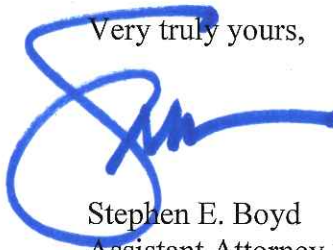
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then the appropriate next step would be for the Committee to contact this office to initiate a joint effort by the Committee and the Department to negotiate a mutually acceptable accommodation under which the Department can satisfy the Committee's legitimate oversight needs to the fullest extent, consistent with the Executive Branch's confidentiality and other institutional interests. Should the branches be unable to reach an acceptable agreement, only then would it be time for the Committee to issue a subpoena and, if necessary and appropriate, for the President to determine whether to invoke executive privilege.

The Acting Attorney General looks forward to testifying about the programs, policies, and activities of the Department. However, given the concerns expressed above, we seek a written assurance from your office that the Committee will not issue a subpoena to the Acting Attorney General on or before February 8, and that the Committee will engage in good faith negotiations with the Department before issuing such a subpoena. We would regard the service of a subpoena today or tomorrow to be a breach of our prior agreement that the Acting Attorney General would testify voluntarily on February 8, consistent with the established practices by which executive officials traditionally appear before the Committee. Absent such an assurance, the Acting Attorney General will be forced to decline to participate in the hearing.

Thank you for your time and consideration of this matter. We request the benefit of your reply by 6 p.m. today.

Very truly yours,



Stephen E. Boyd
Assistant Attorney General

cc: The Honorable Doug Collins
Ranking Member, House Committee on the Judiciary